

IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE  
DIVISION I

STATE OF TENNESSEE

VS.

PERRY AVRAM MARCH

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CASE NO: 2004-D-3113

FILED  
JUL 27 Rec'd 106  
DAVID C. TORRENCE  
CLERK  
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ORDER

I. Introduction

This matter came before the Court upon a pleading entitled "Defendant's Motion *In Limine* No. 1" filed on July 13, 2006. In his motion, the defendant seeks to exclude certain evidence under Tennessee Rule of Evidence 404(b). Having reviewed the defendant's motion and the State's response, the Court concludes the evidence relating to the defendant's conspiracy and solicitation charges shall be admissible for the reasons set out below. The evidence of express kidnappings is excluded at this time. However, the Court reserves ruling on the evidence of express kidnappings pending the presentation of proof in the trial of this case.

II. Background

On December 8, 2004, a sealed indictment was returned against the defendant by a Davidson County Grand Jury.<sup>1</sup> As a result, the defendant was taken into custody in Mexico on August 3, 2005 and transported to Nashville on August 12, 2005. Upon arrival in Nashville, the defendant was housed in the Special Management Unit at the Criminal Justice Complex.

While incarcerated the defendant became acquainted with an inmate named Russell Nathaniel Farris. At some point in their communications Farris and March devised a plot to kill Lawrence and Carolyn Levine.<sup>2</sup> Farris eventually told authorities about the plan and his desire to withdraw from such a plan. Following Farris' withdrawal, he agreed to cooperate with the district attorney's office by wearing a "wire" to record his conversations

<sup>1</sup> In addition to the current case, the defendant was indicted for theft of property over \$10,000.00 and received a separate jury trial on those charges.

<sup>2</sup> The Levines are the parents of alleged murder victim, Janet March, and are prosecuting witnesses in the second degree murder charge.

with March.

Based on these tape recordings and the additional information supplied by Farris prior to the recordings, the defendant was indicted on conspiracy and solicitation charges. These charges were the subject of a jury trial in this Court which began on June 5, 2006. The jury heard the testimony of a number of witnesses and the tape recorded conversations between Farris and the defendant. On June 8, 2006, the jury returned convictions on the conspiracy and solicitation counts.<sup>3</sup> The Court has reviewed its trial notes from the conspiracy charge and the transcripts relating to discussions between the defendant and Mr. Farris.

### III. Discussion/Analysis

In his motion *in limine* (No. 1), the defendant moves to exclude from evidence "any and all crimes, wrongs and acts of the accused which are not charged in the instant indictment except in strict conformity with the procedures specified by Tennessee Rule of Evidence 404(b)." He specifically argues this Court should exclude testimony relating to the conspiracy and solicitation charges. This challenge extends to references of "express kidnappings" made on the tape recordings introduced at the conspiracy/solicitation trial.

Tennessee Rule of Evidence 404(b) provides that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:

- (1) The court must upon request hold a hearing outside the jury's presence.
- (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
- (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
- (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b).

#### A. Jury Out Hearing

First, the court is required to conduct a jury-out hearing on the motion to exclude under 404(b). In the

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<sup>3</sup> The Court recognizes the issues surrounding the dual convictions and will address those issues at the requisite times.

instant case, the matter is being reviewed pretrial and therefore not in a jury's presence. At the motion hearing, the defendant conceded that his prior trial on the conspiracy and solicitation charges equates to a jury-out hearing for the purposes of the rule.

#### B. Material Issue

Next, the Court must determine as to each uncharged crime, wrong or act the material issue the challenged evidence tends to prove, if any. In the present case, the defendant is charged with the second degree murder of his wife, Janet March. Based on information before this Court, adduced from other trials and hearings, it is abundantly clear that the present homicide charge is based almost entirely on circumstantial evidence.

The Court knows generally that the alleged victim, Janet March, disappeared from her home on August 14-15, 1996 and was never seen again according to the State's theory. At or near the time of her disappearance, the defendant and the alleged victim were apparently having marital difficulties. When the alleged victim disappeared, the defendant and his in-laws, Lawrence and Carolyn Levine, decided to wait to report her sudden disappearance. It appears it was not unusual for Ms. March to leave for brief periods to be alone. Soon after the disappearance, the defendant moved to Illinois with his two children. Various custody and other civil proceedings ensued. The defendant eventually moved to Mexico.

On December 8, 2005, a grand jury returned a sealed indictment charging the defendant with offenses including second degree murder of Janet March. All of the evidence supporting the homicide charge has not been revealed to this Court as of the date of this ruling, but much of the information pertinent to this case has been presented at prior trials, hearings and filings with the Court.

Although the state has not yet presented its evidence, it is clear the State will attempt to convince a jury that the defendant, and not some other person, killed Janet March. Identity of the perpetrator is a central issue in this case. In fact, because no body or remains were found, the State will be required to prove that a homicide occurred at all.

While incarcerated, the defendant and another inmate devised a plan to kill the Levines. Both Lawrence and Carolyn Levine are prosecuting witnesses in the homicide charge. From evidence taken in other trials and hearings, the Court learned that animosity between the defendant and Levines has escalated over the years since the disappearance of Janet March. In the tape recordings played at the conspiracy/solicitation trial, the defendant makes



references to the Levines as witnesses and to their role in the homicide trial. The defendant also references his odds of prevailing in the homicide trial with and without the Levines. In the tape recordings the defendant is heard telling Farris that his odds of prevailing improve with the Levines out of the picture.

In Tillery v. State, 565 S.W.2d 509 (Tenn. Crim. App. 1978), an eyewitness testified at trial that several months after the murder he was threatened by the defendant. Id. at 510. The Court of Criminal Appeals noted that "[a]ny attempt by an accused to conceal or destroy evidence, including an attempt to suppress the testimony of a witness, is relevant as a circumstance from which guilt of the accused may be inferred." Id. at 511.

The Tillery holding was echoed in State v. Maddox, 957 S.W.2d 547 (Tenn. Crim. App. 1997). Maddox challenged the trial court's admission of letters written by him to Essex (who was a witness at trial) while Essex was incarcerated in Georgia. The court noted that one of the letters appeared to be threatening Essex not to tell the police what he knew about the robbery. Id. at 551-52. The letter read in pertinent part "... I hate to say, who ever [sic] is trying to snitch, is headed for a six foot trial ... I just wanted to know if or would you sell me out to save your own ass ...". Id. Citing Tillery, the Maddox court similarly concluded that such evidence was relevant and admissible in the current trial. Id. This Court notes that the Maddox court found some portions of the letters to be highly prejudicial.

Recently, the Court of Criminal Appeals again addressed the issue of evidence relating to attempts to conceal or destroy evidence. In State v. Tammie Works, No. W2005-01048-CCA-R3-CD (Tenn. Crim. App. filed May 26, 2006 at Jackson), a statement attributed to the defendant was admitted at trial. The officer testified that the defendant made the remark there "wasn't nobody going to make it to testify against him in the courtroom." Id. at \*24-\*25. The Works panel cited Tillery with approval but went further to explain the circumstances under which such evidence would be relevant. "The Tennessee Supreme Court has endorsed this Court's holding that '[g]enerally, evidence of threats against witnesses attributed to the accused is probative as being either (1) conduct inconsistent with the accused's claim of innocence or (2) conduct consistent with the theory that the making of such threats evinces a consciousness of guilt.'" Id. at \*25 (quoting State v. Austin, 87 S.W.3d 447, 477 app. (Tenn. 2002)). The Works court concluded the statement made by the defendant to the testifying officer "was relevant ... and further [found] that no danger of unfair prejudice substantially outweighed its admission." Id.

The identity of the perpetrator of the homicide is an issue for the jury in the instant case. Therefore, the evidence of the conspiracy and solicitation is relevant in the homicide case per the Tillery line of cases. Further, as

applied to this case, the defendant's attempt to eliminate the Levines as witnesses is probative as both inconsistent with claim of innocence and evidencing a consciousness of guilt.

The defendant acknowledges that "an attempt to suppress the testimony of a witness is relevant as a circumstance from which guilt of the accused may be inferred." As such, the defendant concludes it cannot contend Rule 404(b)(2) is not satisfied.

Based on the foregoing, the Court concludes the proposed evidence relates to at least the issue of identity in the present homicide case. Accordingly, 404(b)(2) has been satisfied as to the evidence of conspiracy and solicitation.

A more difficult issue arises as to the other crime, wrong or bad act referenced during the conspiracy trial and challenged herein by the defendant. In the June 2006 jury trial on the conspiracy and solicitation counts, the jury heard references on the tape recordings to "express kidnappings" in Mexico. The defendant explained to Farris that the two of them would go to Mexico after the case against him fell apart and engage in kidnappings of the children of wealthy parents. According to the defendant, the children would be held for a large ransom. The defendant specifically mentioned a gentleman who would pay large sums of money for the return of his daughter. The defendant implied he had committed them in the past.

The defendant also moves to exclude this testimony as irrelevant and highly prejudicial in this 404(b) analysis. At this time, the Court questions the relevance of the evidence of expressed kidnappings in the second degree murder case. Based on the information known to the Court at this pretrial stage, the Court cannot conclude that this evidence supports any of issues typically recognized as 404(b) exceptions. While the kidnapping evidence relates to a possible motivation for Farris to participate in a plot to kill the Levines, its direct applicability or relevance is not readily apparent in the homicide trial. At this time, the Court finds this evidence must be excluded.<sup>4</sup> As noted below in the Court's application of the 404(b) balancing test, the relevance and eventual admissibility of this evidence must be determined at a later time as the evidence at trial develops.

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<sup>4</sup> Some specific references contained on tape recordings which would need to be redacted include: line 1388 through 1420 (p.30) and line 2301 through 2306 (p.49) of the 10/6/05 conversation; line 1239 through 1402 (pgs.33-38) and line 3798 first sentence (p.101) of the 10/6-10/7/05 conversations.

### C. Clear and Convincing

Rule 404(b)(3) requires the Court to find the existence of the other crimes, wrongs or acts by clear and convincing evidence. Here, the other crime evidence (i.e. conspiracy and solicitation) was presented to a separate jury in a separate trial. The jury found the defendant guilty of these counts beyond a reasonable doubt. Having heard the evidence, the Court accepts their verdict and finds the existence of these crimes not only by clear and convincing evidence but also beyond a reasonable doubt. Therefore, this element has been satisfied.

### D. Probative Value v. Unfair Prejudice

The final prong of Rule 404(b) is the balancing of the probative value of the evidence against the danger of unfair prejudice resulting from admission of the evidence. The defendant claims that, although the evidence is arguably relevant under 404(b)(2), the prejudicial effect of admission of his convictions of inchoate offenses would be "monumental." Therefore, he seeks to exclude the evidence under this prong of the analysis.

### Conspiracy and Solicitation

First, the Court conducts this evidentiary balancing test on the evidence relating to the conspiracy and solicitation charges. Without question, the evidence of defendant's participation in a plot to kill the Levines is prejudicial. In fact, the evidence introduced at the June 2006 trial resulted in convictions on conspiracy and solicitation. Of course the effect of its admission in the homicide trial depends on the jury's perception of the evidence.

However, this same evidence is also highly probative for the reasons set out in the discussion above. The defendant is now on trial for killing his wife, Janet March. Evidence that the defendant devised a plan to kill two witnesses in the homicide trial (Lawrence and Carolyn Levine) is highly probative on the issue of identity. As found in Tillery and its progeny, this evidence goes directly to the defendant's consciousness of guilt and could tend to negate any claim of innocence made by him. This is not a case where the other crime, wrong or act is so removed from the instant offense that its admission would unfairly prejudice the defendant. Instead, the conspiracy related directly to killing of two prosecuting witnesses in the homicide trial.

Applying the balancing test of 404(b), the Court concludes the probative value is not outweighed by the



danger of unfair prejudice. The evidence of the conspiracy and solicitation trial is admissible in the homicide trial.

#### Express Kidnappings

As discussed above, this Court finds that the relevance of references to express kidnappings is questionable at this juncture. While highly relevant to the conspiracy charges and the trial thereof, the testimony of express kidnappings is farther removed from the homicide charges. In other words, it is a peripheral issue at best and relates to possible motives for Farris to join in a conspiracy - not necessarily a concern for the jury in the homicide case.

Even if relevant here, the evidence brings a different result in the 404(b) balancing test. The jury in this case will hear evidence that the defendant allegedly killed his wife, Janet March. Based on this Court's ruling, they will also hear about a conspiracy to kill Ms. March's parents, Lawrence and Carolyn Levine. Admission of the express kidnapping evidence could result in a "mini-trial" on the conspiracy/solicitation charges and likely overshadow the underlying and relevant conspiracy/solicitation evidence presented to the jury in the homicide case.

Accordingly, the Court must conclude at this time that the evidence of "express kidnappings" must be excluded under the 404(b) balancing test. The danger of unfair prejudice outweighs the probative value.

However, the Court recognizes the evidence could become relevant during the homicide trial either in response to cross-examination or in rebuttal, depending on the proof. Therefore, the Court will revisit the issue upon motion of either party at the appropriate time.

#### **IV. Conclusion**

For the foregoing reasons, the defendant's Motion In Limine #1 is hereby DENIED in part and GRANTED in part.

ENTER this the 27<sup>th</sup> day of July, 2006.

  
Hon. Steve R. Dozier, Judge  
Division I

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